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Albert J. Castagno and Bernice B. Castagno v. Melvin Church and Esther C. Church : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALBERT J. CASTAGNO and :
BERNICE B. CASTAGNO, his :
wife, :

Plaintiffs-Respondents, :

-vs- : Case No. 14412

MELVIN CHURCH and :
ESTHER C. CHURCH, :
his wife, :

Defendants-Appellants. :

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

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TABLE OF CONTENTS

	<u>Page</u>
PETITION FOR REHEARING -----	1
STATEMENT OF FACTS -----	2
BRIEF IN SUPPORT OF PETITION -----	6
POINT I. THE COURT FAILED TO CONSIDER DEFENDANT APPELLANTS' CLAIM THAT THE TRIAL COURT ERRO- NEOUSLY DENIED APPELLANTS' ATTEMPT TO INTRO- DUCE EVIDENCE TO CLARIFY THE AMBIGUITY OF THE UNIFORM REAL ESTATE CONTRACT REGARDING THE TWO SECOND FEET OF WATER REFERRED TO IN SUCH CONTRACT. -----	6
POINT II. THE COURT DID NOT CONSIDER THE TRIAL COURT'S ERROR IN REFUSING TO PERMIT THE DEFENDANTS TO SHOW THAT THE DEFENDANTS HAD IN FACT PERFORMED AS FAR AS POSSIBLE THEIR AGREEMENT TO PROVIDE THE TWO SECOND FEET OF WATER AS CONTEMPLATED BY THE PARTIES. -----	8
POINT III. IN PERMITTING THE TRIAL COURT TO INVOKE THE PROHIBITION AGAINST THE PAROLE EVIDENCE RULE, THE COURT PREVENTED THE DEFENDANTS FROM TESTIFYING TO OR SUBMITTING EVIDENCE OF THE DEFENDANTS' THEORY OF DAMAGES, SINCE THE TRIAL COURT CONSISTENTLY MAINTAINED THAT THE PROPERTY IN QUESTION DID NOT HAVE ANY WATER RIGHTS AVAILABLE TO THE PROPERTY. -----	10
CONCLUSION -----	11

CASES AND AUTHORITIES CITED

Jones v. ACME Building Products, Inc., 22 Utah 2d 202, 450 P2d 743. -----	7
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IN THE SUPREME COURT OF THE STATE OF UTAH

ALBERT J. CASTAGNO and
BERNICE B. CASTAGNO, his
wife,

Plaintiff-Respondents,

-vs-

MELVIN CHURCH and
ESTHER C. CHURCH,
his wife,

Defendant-Appellants.

Case No. 14412

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

The Defendants and Appellants, pursuant to Rule 76 (e) (1), petition the Court for rehearing in the above-entitled case for the following reasons.

1. The Court failed to consider Defendant-Appellants' claim that the Trial Court erroneously denied Appellants' attempt to introduce evidence to clarify the ambiguity of the Uniform Real Estate Contract regarding the two second feet of water referred to in such contract.

2. The Court did not consider the Trial Court's error in refusing to permit the Defendants to show that the Defendants had in fact performed as far as possible their agreement to provide the two (2) second feet of water as contemplated by the parties.

3. In permitting the Trial Court to invoke prohibition against the Parole Evidence Rule, the Court prevented the Defendants from testifying to or submitting evidence of the Defendants' theory of damages which would have been the alleged loss of one second foot of water at the proposed point of diversion.

STATEMENT OF FACTS

The Defendants Church were the owners of certain lands located in Tooele County, and Mr. Church is a well driller by profession. The Plaintiffs are residents of Tooele County and desired to purchase the real estate owned by the Defendants Church with the understanding that a well would be drilled on the property by the Defendants for irrigation purposes which would deliver two (2) second feet of water. For the Defendants to deliver the agreed two (2) second feet of water from a well and pump on the land in question, the parties had to either obtain the rights to develop water from previously approved applications or obtain previously appropriated water, since the Tooele area had been closed to further appropriations by the Utah State Engineer's Office. Consequently, in anticipation of the agreement to purchase and sell Defendants' land, the parties attempted to obtain certain water rights from a third party with an application for change in diversion point to the Defendants' land being sold. However, that attempt was frustrated by the fact that the water right in question was in another district which was not transferable to the district in which the Defendants'

land was located. Subsequently, the Defendants Church learned through the State Engineer's Office that the Plaintiffs' mother had an approved application which had not yet been perfected, and the parties therefore jointly arranged to obtain the approved application from Plaintiffs' mother. The parties agreed that the Defendants would retain three-fifths ($3/5$) interest to the approved application which was for five (5) second feet of water and that two-fifths ($2/5$) interest, the equivalent of two (2) second feet of water, would be assigned to the property being sold by the Defendants to the Plaintiffs with the understanding that the Defendants would drill and complete the well and install a pump. The parties agreed that they would then jointly apply for a change in diversion point on the approved application from the Plaintiffs' mother's property to the Defendants' property and perfect the two (2) second feet of water pursuant to the agreement.

To understand Defendants' claim that the parole agreements were an integral part of the contract sued upon, and to also show that the Defendants performed their part of the contract as far as permitted by the Plaintiffs, the following events are shown chronologically:

1. Earnest money receipt for purchase of agreement, dated March 10, 1973.
2. Assignment of water right from Plaintiffs' mother to Plaintiffs, August 20, 1973.
3. Assignment of three-fifths ($3/5$) interest to approved application number 32822, September 7, 1973.
4. Uniform Real Estate Contract dated December 14, 1973, executed December 18, 1973.

5. Application for segregation of water right dated February 26, 1974.
6. Application for change in diversion point for water rights dated February 26, 1974.
7. First hearing for Defendants' change of applications with State Engineer, September 17, 1974, cancelled at Plaintiffs' request, September 17, 1974.
8. Tender of payment of Uniform Real Estate Contract, March 13, 1975.
9. Complaint filed by Plaintiffs on or about May 15, 1975.
10. Trial, October, 1975.

After the parties had acquired the approved application from Plaintiffs' mother and the three-fifths (3/5) interest to said application conveyed by the Plaintiffs to the Defendants, and the other two-fifths (2/5) interest was retained by the Defendants for the property being sold, the Plaintiffs refused to proceed with the application for change in diversion point, and claimed that the Defendants had failed to deliver the one (1) second foot of water as agreed in the earnest money receipt.

Based upon Defendants' application to segregate a water interest and to obtain a change in diversion point, a hearing was scheduled by the State Engineer's Office. At the insistence of Plaintiffs' attorney, Mr. Edward Watson, the hearing was cancelled a few hours prior to the time of the hearing and no further hearing was held on the matter, through and including the trial date of this case. After the hearing was cancelled at Plaintiffs' attorney's request, certain Affidavits of Protest were filed by several of the Castagno families who are all cousins of the Plaintiffs

in this action. The Affidavits of Protest stated, among other things, that Defendants did not have good title to the approved application conveyed to them by the Plaintiff Castagnos.

At the time of trial, one of the issues to be determined was whether the Defendants Church had breached their agreement in failing to convey to the Plaintiffs Castagnos one (1) second foot of water as contemplated by the Uniform Real Estate Contract. The Plaintiffs contended that the Defendants had breached their agreement by failing to deliver the rights to one (1) second foot of water and therefore the Plaintiffs suffered damages, being the difference between the land without irrigation and the land under irrigation. The Defendants attempted to show, in clarification of the wording of the Uniform Real Estate Contract which was dated December 14, 1973, they had already performed on their agreement as to the one (1) second foot of water since the Plaintiffs had retained the rights to perfect two (2) second feet of water from the approved permit purchased from the Plaintiffs' mother, as intended by the parties, and that one-fifth ($1/5$) interest was Defendants' contribution to fulfill the provisions of the Uniform Real Estate Contract. The Defendants further attempted to show that the only reason the approved application had not been perfected to meet the provisions of the Uniform Real Estate Contract is because the Plaintiffs refused to proceed as verbally agreed between the parties to file their application for change in diversion point and to file a segregated application. Further, that Plaintiffs had their attorney cancel the hearing on the applications which had been

scheduled prior to the trial of this case. Furthermore, the subsequent attempt by the Defendants to perfect the water right in question was impeded by the protests filed by Plaintiffs' cousins.

BRIEF IN SUPPORT OF PETITION

POINT I

THE COURT FAILED TO CONSIDER DEFENDANT APPELLANTS' CLAIM THAT THE TRIAL COURT ERRONEOUSLY DENIED APPELLANTS' ATTEMPT TO INTRODUCE EVIDENCE TO CLARIFY THE AMBIGUITY OF THE UNIFORM REAL ESTATE CONTRACT REGARDING THE TWO SECOND FEET OF WATER REFERRED TO IN SUCH CONTRACT.

As outlined in the Statement of Facts, the parties contemplated obtaining two (2) second feet of water not through a new application for appropriation, since both parties knew that the Tooele area had been closed to new appropriations. The parties did contemplate that a water right would either be transferred by an application for change in diversion point, or a previously approved application would be perfected with a change in diversion point and beneficial use of the water. Consequently, the parties intentionally and with full knowledge left the well certificate number blank on the Uniform Real Estate Contract since the well certificate number or the number for the certificate of appropriation could not be written into the contract until the change of diversion point had been approved, the water appropriated for beneficial use, and a certificate of appropriation approved by the State Engineer's Office. Both Plaintiffs and Defendants were fully apprised that the provisions relating to two (2) second feet of water, one of which was to be

provided by the Defendants, and one of which was to be provided by the Plaintiffs, were water rights which the parties jointly intended to perfect in the future.

The Trial Court, however, consistently held that none of this evidence was admissible because it violated the rule against parole evidence. Defendants consistently maintained that such evidence was being offered for the purpose of clarifying the ambiguity in the Uniform Real Estate Contract relating to the two (2) second feet of water and the certificate number which was left blank. The Uniform Real Estate Contract was prepared by Plaintiffs' attorney.

The rule on parole evidence in the State of Utah is well defined. In Jones vs. ACME Building Products, Inc., 22 Utah 2d 202, 450 P2d 743, the Trial Court was confronted with the definition of the term "net worth". The Trial Court ruled that there was no ambiguity as to the term net worth, but the Supreme Court reversed the Trial Court's decision and held that the term net worth was sufficiently ambiguous that parole evidence should have been permitted by the Trial Court.

In the instant case, the ambiguity is more obvious than the term net worth in that the parties referred to a "certificate number _____", which would have very little meaning without the parole testimony to explain why the parties executed the contract without the certificate number. Furthermore, the contract was ambiguous in not clearly defining how the Plaintiffs and the Defendants were to each deliver the rights to one (1) share of water

to the property sold by the Defendants to the Plaintiffs, when the entire Tooele area was closed to new appropriations.

Had the Trial Court permitted the parole testimony, there is little question that the case would have resulted in a decision favoring the Defendants rather than the Plaintiffs. The Statement of Facts clearly outlines the evidence the Defendants intended to submit to the Trial Court which was refused as being in violation of the Parole Evidence Rule.

POINT II

THE COURT DID NOT CONSIDER THE TRIAL COURT'S ERROR IN REFUSING TO PERMIT THE DEFENDANTS TO SHOW THAT THE DEFENDANTS HAD IN FACT PERFORMED AS FAR AS POSSIBLE THEIR AGREEMENT TO PROVIDE THE TWO SECOND FEET OF WATER AS CONTEMPLATED BY THE PARTIES.

The earnest money receipt which outlined some of the provisions of the intended agreement was dated March 10, 1973. The Uniform Real Estate Contract was dated December 14, 1973, and executed on the 18th of December, 1973. During the interim between the earnest money receipt and the Uniform Real Estate Contract, the parties, in an effort to meet their respective obligations of providing one (1) second foot of water each to the property being purchased by the Plaintiffs from the Defendants, attempted to obtain water from a district other than the district within which the land in question was located and failed in that attempt. The parties therefore obtained the rights, pursuant to an assignment of a previously approved Application for Appropriation, number 32822, from the Plaintiffs' mother. This was

accomplished in August and September of 1973, between the dates of the earnest money receipt and the date of the Uniform Real Estate Contract.

The Uniform Real Estate Contract referred to a "well certificate number _____" and a "certificate number _____" in anticipation of perfecting the approved application obtained by the parties. Prior to the final payment of the contract, which was on March 13, 1975, the Defendants had applied for a change in diversion point for certificate number 32822 (February 26, 1974), and had also applied to segregate water rights on certificate number 32822 (February 26, 1974). The Plaintiffs refused to file similar applications for their interest on certificate number 32822. Notice for the change of application submitted by the Defendants was published as required by law, and a hearing was set for September 17, 1974, prior to the initiation of the case before the Court. On the date of the hearing as scheduled, Plaintiffs' attorney, Edward Watson, and the attorney for Plaintiffs' cousins, Mr. John Rokich, called and cancelled the hearing. The hearing was not immediately reset by the State Engineer's Office, and was not rescheduled until February 26, 1976, four (4) months after the trial of the above-entitled matter.

By invoking the prohibitions against parole evidence, the Trial Court prevented the Defendants from showing that the Defendants had actually performed, as much as permitted by Plaintiffs, their agreement to provide the one (1) second foot of water.

POINT III

IN PERMITTING THE TRIAL COURT TO INVOKE THE PROHIBITION AGAINST THE PAROLE EVIDENCE RULE, THE COURT PREVENTED THE DEFENDANTS FROM TESTIFYING TO OR SUBMITTING EVIDENCE OF THE DEFENDANTS' THEORY OF DAMAGES, SINCE THE TRIAL COURT CONSISTENTLY MAINTAINED THAT THE PROPERTY IN QUESTION DID NOT HAVE ANY WATER RIGHTS AVAILABLE TO THE PROPERTY.

Throughout the trial the Defendants were prohibited from referring to the two-fifths (2/5) interest which the Plaintiffs retained of the approved application number 32822 which the parties acquired from Plaintiffs' mother. Consequently, the Defendants were prevented from showing that the two (2) second feet of water which could have been perfected pursuant to the application number 32822 was intended to fulfill the obligation whereby the parties were each to provide one (1) second foot of water. Due to this prohibition, the Trial Court proceeded on the assumption that no water was available on the property purchased by Plaintiffs, and that the Defendants had no way of providing the one (1) second foot of water contemplated by the parties. In fact, the Plaintiffs are still in a position to now proceed to perfect the water rights as to two (2) second feet of water by an application for segregation and an application for change in diversion point and by beneficial use and appropriation of the water. The irrigation well, which the Defendants drilled on the Plaintiffs' property, was drilled in contemplation of these applications for segregation and change in diversion point and is fully capable of delivering the quantity of water which was contemplated between the parties.

Consequently, if the Plaintiffs are permitted to prevail as the Trial Court decided, the Plaintiffs will have the benefit of a well completed

with pump and a two-fifths (2/5) interest in and to an approved application representing two (2) second feet of water which could be perfected at any time Plaintiffs desire, and a reduction in contract price of Twelve Thousand Dollars (\$12,000) as ordered by the Trial Court, and the further benefit of having land with a fair market value of Fifteen Hundred Dollars (\$1,500) per acre immediately after the perfection of the two-fifths (2/5) interest in and to the approved application number 32822.

CONCLUSION

The Defendants respectfully submit that the Court failed to properly review the Trial Court's error in refusing to permit evidence, both written and parole, to clarify what the parties had intended regarding the two (2) second feet of water which was to be contributed equally between the Plaintiffs and the Defendants. By doing so, the Court further deprived the Defendants of the right to show the proper measure of damages, if any, which the Plaintiffs might have suffered, which would be the Defendants' failure to deliver one (1) second foot of water at the proposed point of diversion on the land sold by the Defendants to the Plaintiffs.

The evidence clearly shows that the irrigation well was drilled by the Defendants as agreed, that there was water available in the well for irrigation purposes, that the Plaintiffs still have a two-fifths (2/5) interest in and to an approved application for appropriation of water, that the Plaintiffs had used, on a temporary basis, the water available in the well, that the Plaintiffs have had sufficient water to irrigate crops with the

water from the well, and there is no reason to believe that the two-fifths (2/5) interest in and to the approved application number 32822 cannot be perfected by Plaintiffs' application for change in diversion point, for segregation of water rights, and by actual beneficial use.

If the Trial Court's decision is upheld, the Plaintiffs are left in a position of having reduced the contract price for the land which they purchased from Eight Hundred Dollars (\$800) to Five Hundred Dollars (\$500) per acre, of having obtained an irrigation well and the right to perfect two (2) second feet of water on the land purchased by the Plaintiffs, all to the detriment of the Defendants, and according to Plaintiffs' own evidence, the land purchased by the Plaintiffs would have a fair market value of Fifteen Hundred Dollars (\$1,500) per acre since the irrigation water is available to the Plaintiffs.

Finally, the Defendants are left in a position of having a three-fifths (3/5) interest in and to the approved application number 32822 which they have thus far been unable to perfect because of the protests filed by Plaintiffs' cousins, although the Plaintiffs themselves have not submitted a protest.

The Defendants respectfully submit that the entire case should be remanded to the District Court for a new trial which would include a cause of action to quiet title to the approved application number 32822 which was acquired by the Defendants from the Plaintiffs, who acquired the same from Plaintiffs' mother. Since the Defendants obtained the rights

they may have to the approved application number 32822 from the Plaintiffs, the Trial Court should also determine what damages, if any, the Defendants suffered from Plaintiffs' failure to deliver clear title to the approved permit.

Respectfully submitted,

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